Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-583

WILLIAM S. HERRMANN,

Petitioner,

—against—

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SI[illegible]RMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM and S. HAL MERCER IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BROOKLYN LAW SCHOOL, *ET AL.*, IN OPPOSITION

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November 10, 1978

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BROOKLYN LAW SCHOOL, *ET AL.*, IN OPPOSITION

This brief is submitted on behalf of Respondents Brooklyn Law School, *et al.* ("BLS" or the "Law School") in opposition to the Petition for Writ of Certiorari filed herein by William S. Herrmann.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Wyzanski, J., sitting by designation) (Pet., pp. 3a-18a),* dated May 10, 1978, is reported at 576 F.2d 453, and will be cited throughout by the official report. That opinion affirmed the opinion of the District Court for the Eastern District of New York (Pet., pp. 20a-25a), granting Respondents' motion to dismiss, which is not reported and which will be cited throughout by page number of the Petition Appendix (*e.g.*, "Pet., p. ....a (D. Ct.)").

Counterstatement of Questions Presented

1. Did the Court of Appeals correctly decide that the second clause of 42 U.S.C. § 1985(2) (1970), providing a cause of action for certain injuries done "with intent to deny . . . equal protection of the laws" requires proof of a class-based discriminatory animus?

2. Did the Court of Appeals correctly decide that the dismissal of a faculty member by Brooklyn Law School, allegedly on account of his having brought a federal lawsuit, was the act of a single entity and thus could not have been carried out by a conspiracy of "two or more persons" under 42 U.S.C. § 1985(2)?

3. Was the Court of Appeals correct in treating the judgment of the District Court as one for summary judgment, where both Petitioner and Respondents submitted a large quantity of material outside the pleadings, and all of Petitioner's factual contentions were accepted as true?

* Material in the Appendices to Herrmann's Petition will be referred to as follows: "(Pet., p. ....a)". The Petition itself will be cited. "(Pet., p. ....)".

Constitutional and Statutory Provisions Involved

Petitioner contends that his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution have been violated and seeks recovery under 42 U.S.C. §§ 1983 (1970) and 1985 (1970).*

Counterstatement of the Case

This action against Brooklyn Law School and 38 individuals connected with the Law School constitutes part of an incessant series of groundless, harassing and, thus far, singularly unsuccessful, lawsuits brought by Petitioner, a former professor at the Law School, against many of the same Respondents. Of his entire battery of litigations, none has been so frivolous as this "confusing" (576 F.2d at 454) putative civil rights action. Until now, the centerpiece of this lawsuit was the claim that Petitioner (an adult, white, male attorney) was dismissed from the Law School because of his membership in a "contrived" (Pet., p. 25a (D. Ct.)) class of persons advocating the rights of minorities. The Court of Appeals found that, accepting all of Petitioner's factual assertions as true, there simply was no evidence that his dismissal was on account of such advocacy. (576 F.2d at 457). Petitioner's failure to challenge this finding or to cite any

* The relevant constitutional provisions are reprinted in the Petition at 27a-30a. Sections 1983 and 1985 of Title 42 of the United States Code are reprinted in the Petition at 34a-37a.

Respondents note that in the melange of undifferentiated statutory and procedural provisions cited in this section of the Petition (Pet., p. 3), Petitioner has, for the first time, cited the Thirteenth Amendment to the United States Constitution and 42 U.S.C. § 1981 (1970). Respondents object to the whimsical invoking of a constitutional and a statutory provision which were neither cited in the complaint nor briefed at any prior point in this litigation.

evidentiary contention on this crucial issue underscores, and should be determinative of, the inappropriateness of a Supreme Court review of this case.

Factual Background

In early 1973, following heated salary negotiations at the Law School, Petitioner sued a fellow faculty member, Professor Crea, a Respondent herein, in New York City Civil Court for an allegedly slanderous statement apparently arising out of those discussions *(Herrmann* v. *Crea).** Efforts to mediate *Herrmann* v. *Crea* were undertaken, but in vain. (Pet., pp. 20a-21a (D. Ct.)). One of these attempts was made by Justice Edward Thompson, a Respondent herein, who was then both Deputy Administrative Judge of the City of New York and a trustee of the Law School. According to Petitioner, Justice Thompson, in his capacity as Deputy Administrative Judge, exerted pressure on him to withdraw his lawsuit against Crea. (Pet., pp. 4, 11).**

During the course of discovery in *Herrmann* v. *Crea*, Petitioner took the deposition of a student at the Law School, Steven S. Elbaum, and of the then Dean, Raymond E. Lisle. (Pet., p. 21a (D. Ct.)). Petitioner then wrote a letter to the Committee on Character and Fitness of Applicants for Admission to the Bar of the Appellate Division, Second Department, charging Elbaum with perjury at his deposition. After this charge was fully ventilated before the Committee, Elbaum was eventually admitted to practice, "but only after extended delay caused by [Petitioner's] letter." (Pet., p. 21a (D. Ct.)). Petitioner also brought an action against Dean Lisle, Professor Crea, and two other faculty members, all Respondents herein, in federal court, charging them with a conspiracy, *inter alia,* to deprive him of his "proper emolument as a professor of law" *(Herrmann* v. *Lisle).** (A.A., p. 57**; *see* Pet., p. 21a (D. Ct.)).

Petitioner's unfounded smear of Elbaum and his other disruptive behavior, including his filing of *Herrmann* v. *Lisle* in what was later determined to be bad faith *(see* 576 F.2d at 458-59), ultimately led to a petition to the faculty from a Special Committee of the Board of Trustees to inquire into these disruptions and "to report . . . its conclusions . . . and what . . . sanction it deems appropriate" (A.A., pp. 86-88). The necessary procedural steps were then taken to institute a hearing by the full faculty on the trustee petition. (576 F.2d at 458-59).

Petitioner's response to these developments was to institute another lawsuit, this time in New York Supreme Court, seeking to enjoin the proposed hearing *(Herrmann* v. *Brooklyn Law School).*** Following the denial of Petitioner's motion for a preliminary injunction against any further proceedings (A.A., pp. 151-154), the proposed faculty hearing was commenced on August 18, 1975. (576 F.2d at 459). After four days of hearings, at which Petitioner

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* Index No. 24915/73 (N.Y.C. Civil Ct. Kings Co., complaint served April 2, 1973).

** Throughout his papers, Petitioner has distorted the findings of the lower courts. He states in his Petition that:

> "The district court also found that the defendant Thompson, a Justice of the Supreme Court of the State of New York and Administrative Judge of the New York Civil Court threatened and interfered in that lawsuit while acting under 'color of state law' with other respondents. (24a)." (Pet., p. 4).

The District Court made no such finding and could not have done so on this motion.

* 75 Civ. 130 (CPS) (E.D.N.Y., complaint filed Jan. 28, 1975).

** References to the Appellant's Appendix to the Court of Appeals will be denominated "(A.A., p. .....)".

***Index No. 11364/75 (Sup. Ct., Kings Co., complaint served July 21, 1975).

chose not to appear, the faculty found that all but two of the allegations and part of a third were proven.* The faculty also found that several of the proven charges *independently* merited dismissal (A.A., pp. 156-160), and accordingly recommended to the Board of Trustees that Petitioner be dismissed and that his tenure be revoked. (576 F.2d at 459). On September 17, 1975, the Board of Trustees approved the recommendation of the faculty and dismissed Petitioner on the grounds stated therein. *(Ibid.)*

Petitioner's reaction to this dismissal was to bring, during the next fifteen months, three more lawsuits, including this one. The first, *In re Herrmann* v. *Brooklyn Law School,*** was dismissed for lack of subject matter jurisdiction. In the other, *Herrmann* v. *Moore,**** a companion case to the instant action, the individual defendants' motion to dismiss has been granted, and the Law School's summary judgment motion will be filed shortly.†

Proceedings in the District Court

Respondents moved to dismiss this action for lack of subject matter jurisdiction and failure to state a cause of

* Among the charges found proven were that Petitioner "improperly retaliated against Steven S. Elbaum for pursuing a complaint against [him]"; that Petitioner had "intimidated, ridiculed and humiliated students"; and that during an altercation with a student, "he made it apparent to the student in a menacing manner that he was then armed with a pistol." (A.A., pp. 37, 131-134, 157-158).

** 75 Civ. 2159 (JM) (E.D.N.Y., complaint filed Dec. 29, 1975).

*** Index No. 23498/76 (Sup. Ct. N.Y.Co., complaint served Dec. 16, 1976).

† Given what remains pending of Petitioner's avalanche of litigation (*Herrmann* v. *Lisle; Herrmann* v. *Brooklyn Law School;* and one count of the companion *Herrmann* v. *Moore* action), Herrmann would hardly be left remediless were the opinion below to be allowed to stand. *See Cole* v. *University of Hartford,* 391 F.Supp. 888, 893 n.10 (D.Conn. 1975).

action, based on an affidavit of Dean Lisle and a memorandum of law. For the most part, the Lisle affidavit contained a recitation of the background to Petitioner's discharge supported by documentary exhibits (A.A., pp. 24-216), almost all of which was undisputed by Petitioner in his lengthy affidavit in opposition to the motion (A.A., pp. 275-584).*

On October 19, 1977, the Hon. George C. Pratt granted Respondents' motion and entered judgment dismissing the complaint. Petitioner's Section 1983 claim depended on the existence of action under color of law, or "state action", which, in Petitioner's scenario, largely turned on the mediatory activities of Justice Thompson. The Court correctly held that in his role as Deputy Administrative Judge, Justice Thompson's alleged coercion in *Herrmann* v. *Crea* had no legally cognizable effect, as Petitioner continued to pursue that action "with even greater determination." (Pet., p. 24a (D. Ct.)).** As for Justice Thompson's alleged role in Petitioner's dismissal, the Court held that Justice Thompson's "activities as trustee are purely private and thus not cognizable under § 1983." (Pet., p. 24a (D. Ct.)).

The District Court then turned to Petitioner's claims under 42 U.S.C. § 1985. Section 1985(2) provides a cause of action, under certain circumstances, for anyone who has been injured on account of his having been a witness or party in a *federal court* (clause 1), and for any victim of a conspiracy to obstruct or defeat "the due course of justice in any *State . . . with intent to deny . . . equal protection of the laws*" (clause 2) (emphasis added). In his presentation to the District Court, Petitioner ignored

* By virtue of his duties and responsibilities in the Law School's administration, the Dean was, of course, in an entirely suitable position to present these matters.

** Even Petitioner made no claim to the contrary.

clause 2 of Section 1985(2) (*see* A.A., pp. 587-88), the focus of Point 1 of his Petition to this Court, and argued that he had stated a claim under clause 1, dealing with retaliation for participation in a federal lawsuit. The putative basis for his claim was that his discharge was in retaliation for having filed *Herrmann* v. *Lisle*. The District Court held, however, that the facts alleged in the complaint did not set forth the necessary cause and effect relationship (*i.e.*, injury to Petitioner resulting from participation in a federal action) to state a claim under clause 1. (Pet., p. 25a (D. Ct.)).

As for subsection 3 of Section 1985, providing a cause of action for anyone injured as a result of a conspiracy motivated by a "class-based, invidiously discriminatory animus", *see Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971), the Court held that Petitioner's purported class—those who "champion . . . minority groups" (Pet., p. 25a (D. Ct.))—was " 'contrived for litigation' [rather] than a readily cognizable and traditionally protected class." (*Ibid.*) "At best," the Court concluded, Petitioner's allegations presented a possible claim of an interference with his "freedom of expression . . . and, . . . absent state action or a class-based discrimination, such a claim is not cognizable under" 42 U.S.C. § 1985. (*Ibid.*) Petitioner's complaint was therefore dismissed.

The Opinion of the Court of Appeals

Petitioner appealed the District Court's dismissal to the Court of Appeals for the Second Circuit, which affirmed on May 10, 1978. Dealing first with the Section 1983 claim, the Court of Appeals considered all the evidence offered by Petitioner "[t]o meet his burden of proving that Thompson, acting under color of office, subjected him to a deprivation of his Constitutional rights". (576 F.2d at 455).

As the District Court had found, however, even accepting all of Petitioner's fantastic accusations concerning Justice Thompson, the Court of Appeals held that "there is no genuine dispute between plaintiff and defendant that Thompson did not adversely affect" *Herrmann* v. *Crea*. (576 F.2d at 456). Petitioner, therefore, was unable to show a "deprivation" of any constitutional rights. As for his role as Law School trustee, Justice Thompson was "indisputably . . . acting in a private capacity." (*Ibid.*)

Turning to Petitioner's Section 1985(3) claim, the Court accepted as true all of the assertions offered by Petitioner below to support his claim of discrimination against advocates of minority rights. It found, however, that in all of the material submitted by Petitioner, he—

> "does not point to a single instance where . . . the defendants reprimanded [him], disciplined him, refused him promotion or salary increase, or in any way expressed hostility to [him] because of his advocacy of Black persons or other minorities . . . .
>
> . . . .
>
> "In short, there is no evidence that defendants dismissed [him] as a professor, or otherwise penalized him, because of his advocacy of Blacks or other minorities." (576 F.2d at 457).

The Court then dealt with Petitioner's claims under Section 1985(2). As for clause 2 thereof, relating to the alleged obstruction—"with the intent to deny . . . equal protection of the laws"— of Petitioner's use of state courts in *Herrmann* v. *Crea* and *Herrmann* v. *Brooklyn Law School*,* the Court held that the class-based discriminatory

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* In the course of its discussion of Section 1985(2), clause 2, the Court of Appeals mistakenly referred to *Herrmann* v. *Brooklyn Law School* as *Herrmann* v. *Lisle*. (576 F.2d at 458).

animus required by *Griffin, supra,* had not been shown. (576 F.2d at 458).

As for Petitioner's claim under Section 1985(2), clause 1, to the effect that he was discharged for having brought *Herrmann* v. *Lisle,* the Court considered all the evidence offered by Petitioner and found that his attendance in court in *Herrmann* v. *Lisle* was one of the several reasons for his discharge. Nevertheless, since every one of the alleged conspirators "was eitner a trustee or faculty member of the Brooklyn Law School . . . and . . . acting in that capacity in connection with the discharge" (576 F.2d at 459), Petitioner had not alleged a conspiracy of "two or more persons" under 42 U.S.C. § 1985. The District Court's opinion was, therefore, affirmed.

REASONS FOR DENYING THE WRIT

POINT I

Clause 2 of 42 U.S.C. § 1985(2) Requires a Showing of Class-Based Discriminatory Animus.

Petitioner's first point seems to be that clause 2 of Section 1985(2), dealing with obstruction of justice in the state courts "with intent to deny the equal protection of the laws," ought not to require proof of such an intent.* The

* Despite its vague caption—*i.e.*, "This Court should settle the fundamental rights afforded to litigants and witnesses in the courts" (Pet., p. 6)—the gist of this point appears to be Petitioner's displeasure with the fact that—

> "The court of appeals below ruled that interference with state court proceedings was not federally protected without a showing of class-based or other invidiously discriminating animus." (Pet., p. 10).

He asserts that—

> "This is in direct conflict with the decisions enunciated in other federal courts." (*Ibid.*)

requirement of a class-based animus set forth in *Griffin* v. *Breckenridge, supra,* is based on the modifying phrase in Section 1985(3), "with intent to deny . . . the equal protection of the laws." Petitioner suggests that the same phrase in clause 2 of Section 1985(2) ought not to be interpreted similarly.

Significantly, the foregoing is a complete reversal of Petitioner's presentation to the District Court, where, apparently anticipating defeat on the issue of class-based discrimination, he all but abandoned any claim under clause 2 of Section 1985(2):

> "The foregoing first half of Section 1985(2), 'aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurers, in any court of the United States. The federal nexus, then, is not the *class-based, invidiously discriminatory animus required by the second half of the subsection,* but the connection of the proscribed activities to a federal court.' *Brawer* v. *Horowitz,* 535 F.2d 830, 840." (A.A., p. 587) (emphasis added).*

More significantly, the four cases which Petitioner cites (Pet., pp. 7-8) on this issue are directly contrary to the point he appears to be making. For example, the Court in *Brawer* v. *Horowitz,* 535 F.2d 830 (3d Cir. 1976), held that class-based discriminatory animus, while *not* applicable to clause 1 of Section 1985(2), *is* required under clause 2. This distinction rests on the difference in lan-

* Petitioner's argument to the Court of Appeals was to the same effect. Brief for the Appellant to the Court of Appeals, pp. 5-13.

This Court, of course, "[o]rdinarily . . . does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). *Accord, Lawn* v. *United States,* 355 U.S. 339, 362-63 n.16 (1958); *California* v. *Taylor,* 353 U.S. 553, 557 n.2 (1957).

guage in the two clauses and on the court's reading of the legislative history of the Ku Klux Klan Act of 1871. 535 F.2d at 837-40. *See also Kelly* v. *Foreman,* 384 F.Supp. 1352 (S.D. Tex. 1974) (making the same distinction).

In sum, none of the cases cited by Petitioner supports his contention,* and two of them (*Brawer* and *Kelly*) explicitly hold that a class-based discriminatory animus *is* required under clause 2. This view is supported by the overwhelming weight of the case law in various circuits.**

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* *Crawford* v. *City of Houston,* 386 F.Supp. 187 (S.D.Tex. 1974), cited at page 7 of the Petition, involved retaliation on account of plaintiff's testimony in state courts. Retaliation on account of his testimony in federal courts evidently was also involved, however, since the court upheld plaintiff's Section 1985(2) claim only under the *first* clause thereof. 386 F.Supp. at 192.

Equally unhelpful to Petitioner is *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers,* 347 F.Supp. 268 (E.D.Pa. 1972), in which the plaintiffs were blacks who were harassed and intimidated on account of their bringing an employment discrimination suit in *federal* court, the classic class-based discriminatory retaliation which Section 1985(2) was intended to remedy. Although the use of the federal, and not state, courts was involved, Judge Higginbotham nevertheless was careful to note that the *Griffin* class-based animus test was met. *Id.* at 298-99. Indeed, an argument can be made that a class-based animus must be shown under *both* clauses of Section 1985(2). *See Jones* v. *United States,* 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977) (holding that class-based animus is also required under clause 1).

** *Slavin* v. *Curry,* 574 F.2d 1256, 1262 (5th Cir. 1978); *Dacey* v. *Dorsey,* 568 F.2d 275, 277 (2d Cir. 1978); *Phillips* v. *International Association of Bridge Workers, Local 118,* 556 F.2d 939, 940-41 (9th Cir. 1977); *Smith* v. *Yellow Freight System, Inc.,* 536 F.2d 1320, 1322-23 (10th Cir. 1976); *Jones* v. *United States, supra; Hahn* v. *Sargent,* 523 F.2d 461 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976); *Brainerd* v. *Potratz,* 421 F.Supp. 836, 839 n.2 (N.D. Ill. 1976); *Kerckhoff* v. *Kerckhoff,* 369 F.Supp. 1165, 1166 (E.D. Mo. 1974); *McIntosh* v. *Garofalo,* 367 F.Supp. 501 (W.D.Pa. 1973); *Phillips* v. *Singletary,* 350 F.Supp. 297, 302 (D.S.C. 1972) (referring to §§ 1985(2) and 1985(3) as "kindred sections of a common statutory scheme").

POINT II

Petitioner's Dismissal Was the Act of a Single Entity and Therefore Not Actionable Under 42 U.S.C. § 1985(2).

In dismissing Petitioner's Section 1985(2) clause 1 claim, the Court below adhered to the well-established rule that agents of a single entity cannot conspire for purposes of Section 1985, citing *Girard* v. *94th St. & Fifth Ave. Corp.,* 530 F.2d 66 (2d Cir.), *cert. denied,* 425 U.S. 974 (1976). The weight of the case law overwhelmingly supports this view,* especially in an academic context. *See Cole* v. *University of Hartford,* 391 F.Supp. 888, 890 n.1 (D. Conn. 1975) (private university and officials thereof constitute single entity for purposes of alleged conspiracy involving "numerous discriminatory treatments" of discharged teacher).**

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* *See Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.); *Bellamy* v. *Mason's Stores, Inc.,* 508 F.2d 504, 508 (4th Cir. 1974) (Boreman, J., concurring); *Stewart* v. *New York University,* 430 F.Supp. 1305, 1317 n.12 (S.D.N.Y. 1976); *Jones* v. *Tennessee Eastman Co.,* 397 F.Supp. 815, 816 (E.D. Tenn. 1974), *aff'd,* 519 F.2d 1402 (6th Cir. 1975); *Fallis* v. *Dunbar,* 386 F.Supp. 1117, 1121-22 (N.D. Ohio 1974), *aff'd,* 532 F.2d 1061 (6th Cir. 1976); *Milburn* v. *Blackfrica Promotions, Inc.,* 392 F.Supp. 434, 436 (S.D.N.Y. 1974).

** *See also Rubenstein* v. *University of Wisconsin Board of Regents,* 422 F.Supp. 61 (E.D. Wis. 1976) (members of Board of Regents constitute single entity); *Chambliss* v. *Foote,* 421 F.Supp. 12, 15 (E.D.La. 1976), *aff'd,* 562 F.2d 1015 (5th Cir. 1977); *Keddie* v. *Pennsylvania State University,* 412 F.Supp. 1264, 1276 (M.D. Pa. 1976); *Cohen* v. *Illinois Institute of Technology,* 384 F.Supp. 202, 205 (N.D. Ill. 1974), *aff'd,* 524 F.2d 818 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).

In an attempt to avoid the application of the two or more conspirators requirement of Section 1985(2), Petitioner cites *Beamon* v. *W.B. Saunders Co.*, 413 F.Supp. 1167, 1176 (E.D. Pa. 1976); *Jackson* v. *University of Pittsburgh*, 405 F.Supp. 607, 613 (W.D. Pa. 1975); and *Rackin* v. *University of Pennsylvania*, 386 F.Supp. 992, 1005-06 (E.D. Pa. 1974).* Those cases merely stand for the principle that "many continuing instances of discrimination", *Rackin, supra,* 386 F.Supp. at 1005, by agents of a single entity, acting in different capacities, are not necessarily a nonactionable single act of a single entity.

In an effort to bring himself within this group of cases, Petitioner lists his accusations in this matter, ranging from Justice Thompson's alleged coercion in *Herrmann* v. *Crea* to the putative unfairness of the proceedings leading to his ouster. (Pet., pp. 11-13). The problem with this approach, however, is that it obscures the narrowness of the lower court's holding. Only Petitioner's Section 1985(2) *clause 1* claim, relating to alleged retaliation on account of his filing of *Herrmann* v. *Lisle*, was dismissed on the basis of the single entity rule. All of the clause 2 allegations relating to *Herrmann* v. *Crea* were dismissed because of Petitioner's failure to show class-based discrimination. (576 F.2d at 458).

When the allegations relating to *Herrmann* v. *Lisle* are viewed in isolation, even generously supplemented by Petitioner's opposition papers in the District Court,* they all collapse into what is essentially one discriminatory act, namely Petitioner's discharge allegedly on account of his having brought *Herrmann* v. *Lisle*.** Petitioner's elaboration on the details of the proceedings which were a necessary prerequisite to his discharge cannot serve to transform his dismissal into several discriminatory acts by persons acting in different capacities at different times.***

Moreover, as Petitioner points out (Pet., p. 12), the proceedings leading up to his discharge were all carried out pursuant to the mandate of the Special Trustee Committee (576 F.2d at 458-59). Petitioner has pointed to no individual acts of discrimination with regard to *Herrmann* v.

* Once again, Petitioner is presenting to this Court a question which he failed to address in his brief to the Court of Appeals, even though Respondents briefed the conspiracy point before that Court, as they had at the District Court level (*see* A.A., pp. 263-65). *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), and other cases cited at p. 11, *supra*, note.

* It should be noted that in *Beamon* v. *W.B. Saunders Co., supra,* the Court shied away from a dismissal based on the single entity issue because

> "[p]resentation of evidence on questions such as the number of acts of discrimination, and the number of business entities or individuals involved, should be taken. . . ." (413 F.Supp. at 1176-77).

Here, Petitioner was permitted to produce evidence as to all of these matters, and his fantastic scenario of judicial and academic oppression was accepted as true for purposes of this motion.

** Indeed, the only nonconclusory clause 1 allegation in Petitioner's complaint with respect to *Herrmann* v. *Lisle* is the charge, repeated several times, that he was discharged. *See* Complaint herein, ¶¶ 14, 20, 22, 25, 26, 27 (Pet., pp. 41a, 42a-44a). The Special Trustee Petition; the drawing up of charges against Petitioner, including charges relating to *Herrmann* v. *Lisle;* the hearing, including various of the Respondents' testimonies against Petitioner; and the trustees' ratification of the faculty's vote to discharge Petitioner, were simply consecutive elements of the same proceeding leading up to his discharge.

*** Petitioner's Section 1985(2) clause 1 claim is, therefore, distinguishable from *Rackin, supra,* which involved denial of tenure on two separate occasions and a transfer to another department.

Lisle outside the scope of the Special Committee's mandate.*

Petitioner's dismissal, allegedly on account of having filed *Herrmann* v. *Lisle,* must therefore be considered the single act of a single entity and, therefore, not actionable.**

POINT III

The Court of Appeals Properly Considered All of Petitioner's Factual Assertions in the Record and Treated the District Court's Decision as One for Summary Judgment.

Petitioner complains that since the District Court's judgment dismissing his complaint was rendered pursuant to FED.R.CIV.P. 12(b), and since he never received notice that Respondents' motion would be treated as anything but a Rule 12(b)(6) motion, the Court of Appeals erred in reviewing the decision as one for summary judgment. He then suggests (Pet., pp. 16-17) that the Court of Appeals, in effect, made findings of fact against him and that this procedure invalidates that opinion. A review of the Petition and the relevant authorities, however, shows that the District Court's opinion was properly treated as one for summary judgment; that no findings of fact were rendered against any factual contention made by Petitioner; and that Petitioner, even now, can point to no fact he might have introduced as to any issue resolved by the Court of Appeals.

* Petitioner asserts that Respondents Elbaum and S. Hal Mercer, another student, held no position with BLS (Pet., p. 13). Aside from the fact that Petitioner was completely silent in his briefing to the Court of Appeals as to those students' participation, no allegation of the complaint ties Elbaum or Mercer to any conspiratorial activity. Since they are not implicated in any specific allegation in the Complaint, no action may be maintained against them. *Buck* v. *Board of Elections,* 536 F.2d 522, 525 (2d Cir. 1976); *Rende* v. *Rizzo,* 418 F.Supp. 96, 98 (E.D.Pa. 1976).

More importantly, as the court below found, Elbaum appeared as a witness at Petitioner's hearing pursuant to the request of BLS "and did not share in or seek to further the discharge of plaintiff." (576 F.2d at 459 n.6). The same is true of Mercer, whose testimony had nothing to do with *Herrmann* v. *Lisle.*

** Although Petitioner appears to regard this issue as an academic version of "piercing the corporate veil" (Pet., p. 14), BLS "was obviously not incorporated in order to perpetuate . . . discrimination." *Cole* v. *University of Hartford, supra,* 391 F.Supp. at 893.

At the outset of its opinion, the Court of Appeals noted that:

> "After plaintiff filed his complaint, defendants in accordance with Fed.R.Civ.P. 12(b)(6) filed a motion to dismiss the complaint for failure to state a cause of action, and they also presented matters outside the pleadings so that the motion should be treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56. Plaintiff also presented his pertinent material." (576 F.2d at 454 n.1).

According to Professor Moore, this procedure was entirely appropriate. He explains that, in this regard, "labels do not control."

> "[W]here the trial court, in effect, properly treats such a Rule 12(b)(6) motion as one for summary judgment but erroneously characterizes its action as a ruling on a motion to dismiss for failure to state a claim, the ruling will be reviewed as if it had been a ruling on a motion for summary judgment." (footnote omitted). 6 J. MOORE, FEDERAL PRACTICE ¶ 56.02[3], at 56-33 (2d ed. 1976).

As Petitioner points out, the District Court did consider the affidavits submitted by the parties as well as the plead-

ings in reaching its decision. Accordingly, the Court of Appeals was only following the course outlined by Professor Moore.*

Moreover, the Court of Appeals correctly noted that the District Court received "all the material the parties chose to submit". (576 F.2d at 454). Petitioner's belated cry of surprise on this point (Pet., pp. 15-16) misses the mark. Nothing in FED.R.CIV.P. 12(b)—which expressly provides for Rule 12(b)(6) motions to be treated as motions for summary judgment when matters outside the pleadings are presented to the court—requires formal notice to either party. *See* 6 J. MOORE, *supra,* at ¶ 56.02[3]. The Rule only states that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Certainly, the fact that Petitioner filed a lengthy affidavit illustrates both his awareness that the motion would no longer be considered strictly on the pleadings and the fact that he "had full and fair opportunity to submit all pertinent materials." 6 J. MOORE, *supra,* at ¶ 56.02[3].** *See also Fagan* v. *National Cash Register Co.,* 481 F.2d 1115, 1126 (D.C. Cir. 1973). There is, then, no reason for this Court to review the

* Petitioner complains, for the first time in this litigation, that neither the District Court nor the Court of Appeals followed FED. R.CIV.P. 56, insofar as they improperly considered the affidavit of Respondent Lisle, which contained allegedly hearsay statements. Respondents note that neither the District Court nor the Court of Appeals relied on the Lisle affidavit in evaluating whether there were triable issues of fact. On these matters, both courts quite properly uniformly relied on Petitioner's pleadings and affidavit, always resolving any "ambiguities" (576 F.2d at 456) in the light most favorable to him.

** Nowhere does Petitioner state what materials he would have produced or factual assertions he would have made had he "known" that Respondents' motion would be treated as one for summary judgment.

Court of Appeals' determination to treat the District Court's decision as one for summary judgment.*

The Petition (at pp. 16-17) belabors the Court of Appeals' findings (all in Petitioner's favor) as to Justice Thompson's activities with respect to *Herrmann* v. *Crea,* without suggesting any specific disagreement with any of them. Both courts below found that Justice Thompson—even if acting under color of state law—did nothing adversely to affect the outcome of *Herrmann* v. *Crea.* Nowhere does Petitioner suggest what additional facts he might have introduced on that issue, nor did he introduce any below. The Court of Appeals, therefore, was correct in bypassing the state action question and resting its affirmance on the absence of any triable issue of actual deprivation of any right. (576 F.2d at 456).**

Petitioner does suggest at one point that his "additional legal fees and the chilling effect on [his] rights of free

* Once again, Petitioner raises an issue here, namely his purported lack of opportunity to tell the whole story, which was not raised below. This issue need not be considered. *See Youakim* v. *Miller,* 425 U.S. 231, 234 (1976), and the other cases cited at page 11, *supra,* note. Moreover, because FED.R.CIV.P. 12(b) put former Professor Herrmann on notice that he was faced with a summary judgment situation in the District Court, he was in a position to raise the point in his appeal to the Court of Appeals. In his brief, however, he did not even suggest that he might have raised additional factual issues before the District Court or what those issues might have been.

** Petitioner's citation of *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970), and of the other cases at the end of his discussion (Pet., p. 19), therefore cannot salvage his claim. In *Adickes,* for example, plaintiff's factual assertions regarding state action had not been given adequate consideration in the granting of summary judgment against her on that issue below. 398 U.S. at 156-60. Here, Petitioner's extravagant claims were taken as true. His failure to suggest that Justice Thompson's actions under color of law had any effect on *Herrmann* v. *Crea,* however, confirms the correctness of the opinions below.

speech and access to the courts" (Pet., p. 4), resulting from Justice Thompson's alleged intimidation, provide the requisite deprivation. Whatever subjective chilling Petitioner allegedly experienced, however, *see Laird* v. *Tatum,* 408 U.S. 1 (1972), no cognizable deprivation is made out. *Cf. Bradford Audio Corp.* v. *Pious,* 392 F.2d 67, 71-72 (2d Cir. 1968) (although judge with pecuniary interest in case illegally appointed receiver for plaintiff corporation, no violation of Section 1983 where another judge made final decision).*

* Moreover, the court below could have decided the same way on another separate ground briefed below, namely Justice Thompson's total immunity, *see Stump* v. *Sparkman,* 435 U.S. 349 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Kurz* v. *State of Michigan,* 548 F.2d 172, 174 (6th Cir. 1977); *Bradford Audio Corp.* v. *Pious, supra;* which extends even to acts committed " 'in excess of [a judge's] jurisdiction, and . . . maliciously' ", *Stump* v. *Sparkman, supra,* 435 U.S. at 356; *Duba* v. *McIntyre,* 501 F.2d 590, 592 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976).

Since Justice Thompson enjoys immunity for any actions taken in his official capacity, none of his alleged co-conspirators (the other Respondents herein)—who were not otherwise acting under color of law with respect to *Herrmann* v. *Crea*—can be held liable therefor. *See Dacey* v. *Dorsey,* 568 F.2d 275, 277 (2d Cir. 1978); *Kurz* v. *State of Michigan,* 548 F.2d 172, 175 (6th Cir. 1977); *Hansen* v. *Ahlgrimm,* 520 F.2d 768, 770-71 (7th Cir. 1975); *Sykes* v. *California,* 497 F.2d 197, 202 (9th Cir. 1974); *Guedry* v. *Ford,* 431 F.2d 660, 664 (5th Cir. 1970); ***McIntosh*** **v.** ***Garofalo,*** **367 F.Supp. 501, 504-05 (W.D. Pa. 1973).** ***Contra, Kermit Construction Corp.*** **v.** ***Banco Credito Y Ahorro Ponceno,*** **547 F.2d 1 (1st Cir. 1976).**

CONCLUSION

As Judge Wyzanski's opinion in the Second Circuit was based upon well-established legal principles as well as findings of fact unique to this matter, Respondents Brooklyn Law School, *et al.,* submit that plenary review of that opinion by this Court would be inappropriate and respectfully request that the Petition be denied.

Dated: New York, New York
November 10, 1978

Respectfully submitted,

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